



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 16, 1998

Ms. Kristi LaRoe  
Assistant District Attorney  
Tarrant County  
Justice Center  
401 W. Belknap  
Fort Worth, Texas 76196-0201

OR98-0149

Dear Ms. LaRoe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112384.

The Tarrant County Sheriff's Department and the Tarrant County District Attorney's Office (the "county") received a request for all documents relating to a named individual who was involved with an intoxication manslaughter charge and an escape attempt. You advise that you are releasing some of the requested information to the requestor. You claim, however, that some of the requested information is excepted from public disclosure under sections 552.003, 552.101, 552.103, and 552.107 of the Government Code. We have considered the arguments that you raise and have reviewed the documents at issue.

First, you contend that the documents submitted as exhibit D are not subject to the Open Records Act pursuant to section 552.003 as they are records of the grand jury. The act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. *Id.* Information not held or maintained in this manner is not exempt from the act's coverage and may be withheld only if one of the act's specific exceptions applies to the information. *Id.*

Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession and is not subject to the act. *Id.* See also Gov't Code § 552.003. However, if the district attorney's investigation

began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the district attorney's actions in this investigation, then the information is not deemed to be in the grand jury's constructive possession. The fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney. *Id.* Thus, if the documents in exhibit D were obtained at the direction of the grand jury or pursuant to a grand jury subpoena, then they are not subject to the act. Otherwise, they must be released as you have not raised any of the act's exceptions from public disclosure for the documents. However, we caution that some of the information may be confidential by law. *See* Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

Next, you claim that section 552.101 excepts exhibits E, F, and G from public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes. First, you assert that exhibits E and F are protected by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. The MPA protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). Most of the documents in exhibits E and F are medical records access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA. We have marked the documents which are not medical records and must be released.

You also assert that the criminal history report information ("CHRI") contained in exhibit G is protected by federal law and section 411.083 of the Government Code. Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the

information except as provided by Chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Please note, however, that driving record information is not confidential under chapter 411, *see* Gov't Code § 411.082(2)(B), and must be disclosed.

Lastly, you claim that section 552.107 excepts exhibit H from public disclosure. Moreover, you contend that exhibit H is protected from disclosure as attorney work product under section 552.103. We will address your work product argument first. The work product of counsel is just one category of information excepted by section 552.103(a). Open Records Decision No. 575 (1990). Like any other information, attorney work product is protected from disclosure under section 552.103 only if it relates to pending or anticipated litigation. *Id.* at 2. During the pendency of litigation, a governmental body may withhold attorney work product under sections 552.103 or 552.111 of the Government Code. Open Records Decision No. 647 (1996). The first requirement that must be met to consider information attorney work product is that the information must have been created for trial or in anticipation of litigation. There are two prongs to this requirement, each of which must be met. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

*See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 (1996) at 4. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein.

After reviewing your arguments, we conclude that you have not demonstrated that the documents in exhibit H were created in anticipation of litigation. Thus, you may not withhold exhibit H as attorney work product pursuant to sections 552.103 or 552.111.

Next, we consider your section 552.107 claim as to exhibit H. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. We have marked the information that you may withhold under section 552.107. Excepted for the information discussed below, you must release the remaining information in exhibit H.

We note that exhibit H includes information that is made confidential by law and must not be released. First, section 552.130 of the Government Code, which governs the release and use of information obtained from motor vehicle records, provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

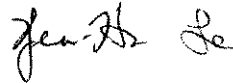
(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Gov't Code § 552.130. Therefore, you must withhold the driver's license information, such as the driver's license number and the type of license, pursuant to section 552.130.

Second, exhibit H contains social security numbers. A social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in exhibit H are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law, enacted on or after October 1, 1990.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 112384

Enclosures: Marked documents

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(w/o enclosures)